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Statutory Larceny in West Virginia

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a constitutional and vested right." A Wisconsin statute on the question of damages provides that in the exercise of eminent domain by the state in the case of streets or highways, damages and benefits shall be allowed and the excess of one over the other shall be stated.³⁵ Construed in a recent case,³⁶ it was held to cover benefits accruing to the general public as well as benefits resulting specially to land taken.

In the later statutes and decisions is manifested a trend toward the policy of considering all benefits in the determination of damages in these cases. This trend, as previously indicated, is nurtured in the present policy of the state in trying to bring down excessive costs of rights-of-way so as to make the money appropriated for roads and other public improvements go as far as possible. Also there has grown up a changed concept of the sacred character of real property ownership which might tend to alter the basic theory of "just compensation" in condemnation cases. But whatever the basis of the present policy may be, this problem is a very real and practical one; and it is unfortunate that our cases on this question decided since the 1933 amendment to our eminent domain statutes have failed to take cognizance of the change. It is submitted that, in view of the evident legislative intent back of the statute, the strong policy of today favorable to public improvement, and the recent trend in other jurisdictions on the question as previously shown, the present West Virginia statute should receive an interpretation in all cases involving damage to property which permits the deduction of both general and special benefits from the aggregate damage suffered by the property.

D. R. K.

STATUTORY LARCENY IN WEST VIRGINIA

Larceny by Embezzlement. There being no embezzlement at common law, statutes have been enacted to rectify certain defects or "loopholes" existing in the law of larceny, so as to apply to the fraudulent conversion of money or property otherwise not reached by the common law. A clear understanding of the statute, "strictly construed",¹ is necessary since embezzlement is generally regarded as a separate and distinct crime, although commission of the offense constitutes larceny.

³⁵ WIS. STATS. (1935) c. 32, § 32.10 (1).

³⁶ Nowaczyk v. Marathon County, 205 Wis. 536, 238 N. W. 383 (1931).

¹ State v. Cantor, 93 W. Va. 233, 116 S. E. 396 (1923).

The embezzlement statute,² "among other things, declares it to be larceny for any agent, servant, etc., of any person to embezzle or fraudulently convert to his own use any effects or property of any other person which shall have come into his possession by virtue of his place or employment."³

Under this statute in order to constitute the crime of embezzlement it is necessary to show: (1) the trust relation of the defendant, and that he falls within the class of persons named; (2) that the property or thing claimed to have been converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that the defendant received possession, care or management of it by virtue of his office, place or employment; (5) that his manner of dealing with or disposing of the property constituted a fraudulent conversion and an appropriation of the same to his own use; and, (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof.⁴ The interpretation of the statute will be considered under the topics of these six various elements.

1. *The trust relation of the defendant, and his being within the class of persons named in the statute.*⁵ There is sufficient trust relation shown where the defendant is a contracting agent of the county and is given custody of cement for storage, the same having been purchased by the county court.⁶ An assistant of the Red Cross organization intrusted with flour for storage and distribution,⁷ and a commissioner of the county court who embezzles county funds⁸ are embraced in the terms of the statute. Also included within this class is an insurance agent who collects the premiums on policies sold.⁹

One who is intrusted with a check to collect and account for to another is guilty of embezzlement if he converts it; and this is

² W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 20.

³ State v. Moyer, 58 W. Va. 146, 52 S. E. 30 (1905).

⁴ State v. Workman, 91 W. Va. 771, 114 S. E. 276 (1922) quoting from State v. Moyer, *supra*, note 3.

⁵ "... any officer, agent, clerk or servant of this State, or of any county, district, school district, or municipal corporation, or of any banking institution, or other corporation, or any officer of public trust in this State, or any agent, clerk or servant of any firm or person, or company or association of persons not incorporated" W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 20.

⁶ State v. LaRue, 98 W. Va. 677, 128 S. E. 116 (1925).

⁷ State v. Holley, 115 W. Va. 464, 177 S. E. 302 (1934).

⁸ State v. Workman, 91 W. Va. 771, 114 S. E. 276 (1905).

⁹ State v. Moyer, 58 W. Va. 146, 52 S. E. 30 (1905). He was not entitled to his commissions until the premiums were first turned over to the company in cash. (Reversed on other grounds.)

so, even if it is but a single transaction, there being no necessity of having the trust relation previously established; and the same holds true even if no compensation is received for making the collection.¹⁰ In *State v. Cantor*, where money was delivered to defendant to indemnify him for going on another's trial bond, which was to be returned by him to the owner after the trial, the count of embezzlement for failure to return the money was not upheld because of the lack of any allegation showing the purpose for which the money was intrusted, the trust relation of defendant to the depositor, and the office, place or employment of the defendant in accordance with the statute.¹¹ However, the defendant might be found guilty of larceny, since this state has accepted the somewhat anomalous doctrine that under a common law indictment for larceny one may be convicted of that offense by evidence of embezzlement.¹²

2. *The property or thing claimed to have been converted being such property as is embraced in the statute,*¹³ and (3) *being the property of another person.* This has been held to include money collected as premiums by an insurance agent when the premiums were first to be paid over to the company before the agent was entitled to his commissions.¹⁴ A check drawn on a bank, though not specifically covered by the statute, is within the meaning of the word "property"¹⁵ and *a fortiori* funds of a bank would also be included¹⁶ even without the express term "money" which appears in the statute.

A county order for money is a security for money, a debt owing

¹⁰ *State v. Fraley*, 71 W. Va. 100, 76 S. E. 134 (1912). Of extrinsic interest is the rule that an attorney and client relationship begins when the client expresses a desire to employ the attorney, and the attorney has given his consent to act. This was held to be applicable in the principal case to indicate when the trust relation arose.

¹¹ 93 W. Va. 238, 116 S. E. 396 (1923). The fact that the defendant gave a receipt in the name of a tailoring company which he owned, and entered the amount on the company's books does not show any agency or trust relation, or place or employment.

¹² *State v. DeBerry*, 75 W. Va. 632, 84 S. E. 508 (1915); *State v. Workman*, 91 W. Va. 771, 114 S. E. 276 (1922). In the *Cantor* case, in reaffirming this proposition, the court said ". . . I have grave doubts as to the correctness of the holding. . . .", at 245. For cases contra to the West Virginia rule see 20 C. J. § 56.

¹³ ". . . bullion, money, bank notes, drafts, security for money, or any other effects or property of another person. . . ." W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 20.

¹⁴ *State v. Moyer*, 58 W. Va. 146, 52 S. E. 30 (1905).

¹⁵ *State v. Fraley*, 71 W. Va. 100, 76 S. E. 134 (1912).

¹⁶ *State v. Wetzel*, 75 W. Va. 7, 83 S. E. 68 (1914).

the county, and is within the statute.¹⁷ Under a former statute relating to embezzlement of bank property¹⁸ which has now been included in the present embezzlement statute, the word "money" has been construed to refer to "the currency or circulating medium of the country."¹⁹

Cement belonging to the county,²⁰ flour belonging to the Red Cross,²¹ fees and collections of a county clerk which are the property of the county and state,²² and rugs intrusted to a defendant by an agent of a corporation to be cleaned²³ fall within the statute.

4. *The receiving of possession, care or management of the property by virtue of his office, place or employment.* Collecting money as premiums by an agent of an insurance company,²⁴ receiving rugs under a contract to clean them,²⁵ or handling credits and funds as cashier of a bank²⁶ satisfy the requirements of this element. Likewise one who receives cement for storage which he has sold to the county,²⁷ an agent of the Red Cross organization, who receives flour and has the duty of distributing it,²⁸ and a county clerk who collects fees by virtue of his office,²⁹ are included.

It is possible to commit embezzlement without coming into actual possession of the property. In the case of *State v. Workman*³⁰ county commissioners voted to purchase land for the county at a sum higher than the true price and agreed to divide up the difference. The fact that they did not come into actual possession of the money was held not to preclude their having control by virtue of their offices when they constituted the vendor of the land their agent to cash the court order and pay over to them their respective "shares".

¹⁷ *State v. Workman*, 91 W. Va. 771, 114 S. E. 276 (1922).

¹⁸ W. Va. Acts 1913 (Hogg, 1913) c. 54, § 81a XVII.

¹⁹ *State v. Hudson*, 93 W. Va. 435, 117 S. E. 122 (1923). This definition did not include funds and credits of a bank, and if these latter items were not properly described and identified there could be no conviction of embezzlement of moneys. To obviate this result when the property is not sufficiently described, the present statute specifically states that it is not necessary to describe or identify the property embezzled. W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 20.

²⁰ *State v. LaRue*, 98 W. Va. 677, 128 S. E. 116 (1925).

²¹ *State v. Holley*, 115 W. Va. 464, 177 S. E. 302 (1934).

²² *State v. Smith*, 117 W. Va. 598, 186 S. E. 621 (1936).

²³ *State v. DeBerry*, 75 W. Va. 632, 84 S. E. 508 (1915).

²⁴ *State v. Moyer*, 58 W. Va. 146, 52 S. E. 30 (1905).

²⁵ *State v. DeBerry*, 75 W. Va. 632, 84 S. E. 508 (1915).

²⁶ *State v. Wetzel*, 75 W. Va. 7, 83 S. E. 68 (1912).

²⁷ *State v. LaRue*, 98 W. Va. 677, 128 S. E. 116 (1925).

²⁸ *State v. Holley*, 115 W. Va. 464, 177 S. E. 302 (1934).

²⁹ *State v. Smith*, 117 W. Va. 598, 186 S. E. 621 (1936).

³⁰ 91 W. Va. 771, 114 S. E. 276 (1922).

Merely intrusting property for a single transaction without any prior agency relation, is a sufficient agency or employment within the meaning of the statute, as where one receives a check for which he is made agent for collection.³¹ But where one is temporarily intrusted with money to indemnify him for going on a trial bond this does not in itself show that he received the money by virtue of any office, place or employment.³²

5. *The defendant's manner of dealing with or disposing of the property constitutes a fraudulent conversion and an appropriation of the same to his own use.* As to what constitutes a conversion there is no little controversy. The West Virginia court³³ recognizes as the most comprehensive and accurate definition the one appearing in *Black's Law Dictionary*: "An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's right."

An attempted disposal of goods intrusted to one's care, which is ineffective, may not amount to a conversion within the meaning of the statute. A defendant was given rugs to clean to be delivered back the next morning, and his attempt to sell them being unsuccessful, he stored them in a stable but was arrested that evening. Under his contract of cleaning he had no duty to redeliver them to the owner till the following morning and conviction for embezzlement was therefore reversed.³⁴

Although the rule is frequently so stated, it is not necessary that the defendant appropriate to his own personal use or advantage. In the *Cantor* case, the fact that the defendant turned over the money to his tailoring company which used and controlled it exclusively, would not relieve the defendant if he himself was without right to appropriate it.³⁵

In *State v. Holley*,³⁶ the defendant assisted in the distribution of Red Cross flour to the needy, and some had been stored in a room on his premises. Suspected of using some of it for his own purposes, a search was made, and over defendant's denial that he had any flour, several sacks were found secreted behind a separate compartment, blocked off with building paper, with no door or other means of access thereto. As to the question of conversion, the

³¹ *State v. Fraley*, 71 W. Va. 100, 76 S. E. 134 (1912).

³² *State v. Cantor*, 93 W. Va. 238, 116 S. E. 396 (1923).

³³ *State v. DeBerry*, 75 W. Va. 632, 636-637, 84 S. E. 508 (1915).

³⁴ *Idem*.

³⁵ *State v. Cantor*, 93 W. Va. 238, 249, 116 S. E. 396 (1923).

³⁶ 115 W. Va. 464, 117 S. E. 302 (1934).

court, quoting from *State v. DeBerry*³⁷ the definition set forth in *Black's Law Dictionary*, held that setting the goods aside and secreting them apart from the usual place of the owner's storage, amounted to a conversion.

That embezzlement may be committed without the defendant's ever coming into possession of the property was shown in the *Workman* case. The vote of the commissioners to appropriate the money which could not otherwise be paid out, was the fraudulent conversion and appropriation to their own use, apparently as soon thereafter as their agent received the money for them, the intent to deprive the county thereof being manifest at the time of the voting.

6. *The intent being to deprive the owner thereof.* That the conversion be fraudulently and feloniously done, is a very necessary element, and an instruction to the jury which omits this constitutes reversible error.³⁸ There need be only a general intent or purpose to do the act in violation of the statute. In *State v. LaRue*,³⁹ cement belonging to the county court was placed in defendant's custody, who sold much of it to other persons, without accounting to the county court for the proceeds. It was a clear case of embezzlement, there being little doubt of a complete conversion with the intent to deprive the county thereof.

The gist of the offense is the fraudulent intent to make an absolute appropriation, not merely a design to deprive the owner temporarily. A mere detention of another's money without a fraudulent intent to convert it to one's own use does not constitute embezzlement, for there may exist the intention to repay or restore it.⁴⁰

As a general rule the intent need not exist at the time the defendant received the property, but could occur subsequently at the time of the conversion.⁴¹ However, where a defendant was given a check for collection, and was indicted for conversion of the check, the court stated that defendant would be guilty of the embezzlement of the check itself and also the money received for it if

³⁷ 75 W. Va. 632, 84 S. E. 508 (1915).

³⁸ *State v. Smith*, 117 W. Va. 598, 186 S. E. 621 (1936). At *D*'s request, *A* handed him nine \$50.00 bills so *D* could demonstrate a trick. *D* put the bills in a black trick box, and *A* later found it contained no money. *D* was apprehended after going to a neighbor's house, and he turned over the bills to a justice. *D* was convicted of grand larceny, but not on the theory of embezzlement because of the faulty instruction mentioned.

³⁹ *State v. LaRue*, 98 W. Va. 677, 128 S. E. 116 (1925).

⁴⁰ *State v. Moyer*, 58 W. Va. 146, 52 S. E. 30 (1905).

⁴¹ *State v. DeBerry*, 75 W. Va. 632, 84 S. E. 508 (1915).

he had the intent to obtain the proceeds at the time he received the check. But it would seem that this is more properly a case of larceny by trick.⁴²

The fraudulent intent may be inferred from defendant's conduct.⁴³ When the president and chairman of the board of directors of a bank obtained money by drawing checks on false credits in his favor created by issuing checks on another bank without deposits to meet them, it was held that the circumstances warranted a finding of fraudulent intent on the part of the defendant.⁴⁴ In the *Holley* case, in considering whether the conversion of the flour was with the intent to deprive the owner of the property, the court said that the allegation that a person *fraudulently* did a certain thing is equivalent to a charge that the thing was done with *intent* to defraud. Defendant's concealment of the flour, coupled with his falsehoods in attempting to keep the officers from finding it, "justifies the conclusion that the same had been fraudulently converted to his own use."⁴⁵

Obtaining property by false pretenses. Such an offense is completed where both title and possession of property are obtained by false pretenses with intent to defraud, and the property is delivered with the intention on the part of its owner of parting with it altogether.⁴⁶ This is a purely statutory offense, constituting larceny in West Virginia.⁴⁷

⁴² *State v. Fraley*, 71 W. Va. 100, 76 S. E. 134 (1912). *D* pretended he was a lodge brother and professed other friendship, inducing *A* to give him a check to collect.

⁴³ *State v. Wetzel*, 75 W. Va. 7, 83 S. E. 68 (1912). As where a defendant cashier of a bank furnished false and invalid notes to the commissioner of banking tending to cover up his unlawful appropriations.

⁴⁴ *State v. Frantz*, 108 W. Va. 639, 152 S. E. 326 (1930). *Frantz v. State of West Virginia*, 281 U. S. 767, 50 S. Ct. 465, 74 L. Ed. 1174 (1929) writ of certiorari denied.

⁴⁵ *State v. Holley*, 115 W. Va. 464, 177 S. E. 302 (1934). Defendant predicated a defense on the basis that merely setting the goods aside from the owner's place of storage was to be distinguished as an intent to effect a *future* conversion. The court replied that while concealing alone may or may not amount to a conversion, "concealment with intent to convert the property to one's own use does amount to a fraudulent conversion thereof." (P. 468). In other words, the court is prone to apply the rule laid down in *State v. Moyer*, 58 W. Va. 146, 151, 52 S. E. 30 (1905), that great latitude is permitted in proving or disproving the element of intent in embezzlement cases.

⁴⁶ *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429 (1902). *D* and *X* had enticed *A* into a card game playing for money, and *D* and *X* pretended that *A* and *D* had jointly won from *X* \$2000. As a condition precedent to receiving the money, *D* pretended to put up \$1700, inducing *A* to put up \$300 to total an amount equal to *X*'s \$2000, and the \$4000 was then put into a tin box, prior to dividing it between *A* and *D*. Later *A* was given the tin box to keep the money, until *D* should come to *A*'s house and make the division. *A* later discovered there was no money in the box. Held, larceny by trick, and not ob-

Under the statute it is necessary to allege and prove the following essential elements: (1) intent to defraud; (2) actual fraud; (3) false pretenses used to accomplish the object; and, (4) that the fraud was accomplished by means of the pretense made use of, that is, it must be in some degree the cause, if not the controlling cause, which induced the owner to part with his property.⁴⁸

"With intent to defraud" appears in the statute, and such intent must be present in the mind of the defendant at the time he obtained the property,⁴⁹ for the intent is the gravamen of the offense.⁵⁰ The court has placed a restricted meaning on these broad

taining money by false pretenses. *A* had put the money into the box for a special and limited purpose, to add it to *D*'s \$1700 as a condition precedent to an equal division by *A* and *D*, and *A* parted *only with* possession when *D*, by artifice, extracted the money from the box. See Note (1940) 46 W. VA. L. Q. 246, 250, n. 43, for further discussion of this case, and the distinction drawn between false pretense and larceny by trick.

⁴⁷ W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 24. A violation of only the first provision of this section is declared to be larceny.

⁴⁸ *State v. Pishner*, 72 W. Va. 603, 78 S. E. 752 (1913), citing *Anable v. Commonwealth*, 24 Gratt. 563 (Va. 1873) and *State v. Hurst*, 11 W. Va. 54 (1877).

"... If the representation made is false, if the declaration is that a certain condition exists or does not exist, and the contrary is true, and by reason of this declaration another parts with his goods, and the purpose of the party making it was to defraud, the requirements of the law are met, and the party so obtaining the goods is guilty of the charge of obtaining goods by false pretenses." *Sudnick v. Kohn*, 81 W. Va. 492, 495, 94 S. E. 962 (1918).

⁴⁹ *State v. Smith*, 97 W. Va. 313, 125 S. E. 90 (1924). See note 38, *supra*, for the facts of this case. There could be no conviction under false pretenses section because of a defective instruction which omitted the element of present intent to commit the crime when the money was obtained.

In *State v. Paulian*, 120 W. Va. 265, 197 S. E. 723 (1938) *D* purchased three gallons of gasoline from *A*, and gave *A* a twenty dollar bill, whereupon *A* gave *D* three \$5.00 bills, four \$1.00 bills, and forty-three cents change. On *D*'s requesting a five dollar bill instead of five \$1.00 bills, *A* gave *D* a five dollar bill, which *D* put with two other five dollar bills and five \$1.00 bills, the total of which he gave back to *A*, requesting that *A* give *D* back the twenty dollar bill in exchange therefore. *A*, "thereupon becoming confused by said transactions", gave *D* the twenty dollar bill, accepting from *D* the five dollar bill which *A* had just handed *D*, and the five \$1.00 bills which *D* had originally requested to exchange for the five dollar bill, along with two other \$5.00 bills, and then *D* walked away without giving *A* the five \$1.00 bills for the five dollar bill *A* had given *D*. The court admitted evidence of a previous transaction of the same day whereby *D* secured \$5.00 in like manner, as evidence for the jury in ascertaining *D*'s criminal intent. Conviction of obtaining a five dollar bill by false pretenses affirmed.

⁵⁰ *State v. McGinnis*, 116 W. Va. 473, 181 S. E. 820 (1935). Although this case arose under the "Worthless Check Act" it is applicable here since the same phrase appears in both sections, which are similar in nature. See notes 59 and 60, *infra*.

In *State v. Cobb*, 7 S. E. (2d) 443 (W. Va. 1940) *D*, an assistant county school superintendent, represented to *A*, a high school superintendent, that his school and others were to turn over certain funds monthly to the board of education, whereby *A* gave *D* a check for \$77, the money belonging to the school, but was

words of intent, depending on the nature of the case involved. For example, "A man cannot be held guilty of procuring money by false pretenses, with intent to defraud, who has merely collected a debt justly due him, though in making the collection he has used false pretenses."⁵¹ Apparently, in such cases, there would be no intent to defraud.

In certain factual situations it becomes difficult to determine if false representations have been made, and to ascertain the precise matter which is the basis of the false pretenses.⁵² False representations may be made by acts or conduct as well as by words.⁵³

mingled with A's own funds. Conviction for larceny by obtaining goods by false pretenses reversed for failure to instruct that D must have had the present intent to commit the offense at the time (*cf.* note 49, *supra*). By way of dictum the opinion stated that prearrangement and knowledge by both A and B would not be tantamount to a felonious intent. *Id.* at 445.

⁵¹ State v. Hurst, 11 W. Va. 54 (1877). For consideration A had assigned a bond for \$144.39 to the wife of D, A promising to pay it if B, the obligor, defaulted. Representing there was \$158.00 due on it, D exchanged it with A for that amount. It was contended that since A had promised to pay if B defaulted, A was under a legal obligation to pay the \$144.39, and all that was obtained by false pretenses was the amount he did pay, \$148.00 less the amount he was bound to pay, \$144.39, or \$3.61, which being less than \$20, could not be a felony. Reversed because of the failure of the lower court to so instruct.

In the case of State v. Williams, 68 W. Va. 86, 69 S. E. 474 (1910), representing that he was an agent for B, a butcher, D offered to buy A's cow for \$27.50, and A accompanied D and the cow to town to get the money. Instead of paying cash, however, D presented A with a judgment against A for \$50 assigned to D by X. The judgment was just, but A refused to deal on that basis, and later regained possession of the cow by a detinue bond. D's conviction of obtaining the cow by false pretenses reversed on the grounds that it is no offense to obtain property upon the pretense of buying it for cash, for the purpose of the payment of a just debt equal to or greater in amount than the price of the property. *Id.* syl. 2.

This seems opposed to the weight of authority. See Note (1911) 32 L. R. A. (N. S.) 420, where a distinction is made between (1) a creditor's inducing one by false pretenses to pay a debt knowing that he is paying it, in which case he is not defrauded although induced by false pretenses, and (2) inducing the owner by false pretenses to part with his property or money for some other purpose, with the secret intent on the part of the creditor of applying it on a debt, in which case, he is in fact defrauded of his property by the fraudulent application of it to a purpose other than the one he contemplated.

In the principal case the court stated that there was no doubt that D received possession by means of false pretenses, *i. e.*, representing that he would pay cash for the cow. *Cf.* State v. Augustine, 114 W. Va. 143, 171 S. E. 111 (1933), note 53, *infra*.

⁵² In State v. Cutlip, 78 W. Va. 239, 88 S. E. 829 (1916) Ds, husband and wife, borrowed \$632.50 from A and gave a note for that amount. Shortly after A's death, a paper signed by Ds was found concealed in A's bed, which paper purported to be a contract of sale by Ds to A of realty for \$632.50. Ds were indicted on the theory that they prepared this paper after A's death, unlawfully and fraudulently pretending to have entered into a contract, by means of which false pretenses they attempted to obtain the note from A's estate. Unfortunately for present purposes, the merits of the case were not reviewed

The giving of a worthless check, or one which the defendant had no reason to suppose will be honored, is in itself a false pretense, the giving of the check being a representation that the defendant has money or credit with the drawee to the amount of its face value.⁵⁴ This amounts to a representation of a present ability to meet the obligation represented thereby, *without which* the defrauded person would not have relinquished his title, *i.e.*, he must be induced to part with his property relying on the false pretenses.⁵⁵

since a demurrer was sustained, necessitating a reversal for defective allegation of ownership.

On January 25, 1939, in payment for gasoline, *D* gave *A* a check dated "January 28", apparently post-dated, but actually dated "1938" instead of "1939" which both *D* and *A* failed to notice. The check was dishonored and *A* had *D* arrested, and he was indicted for obtaining property by false pretenses on the theory that the check was a forgery, whereas *D* represented it as a valid check. Conviction was reversed because of a faulty instruction which presumed the forgery, and also failed to instruct as to *D*'s fraudulent intent. *State v. Laskey*, 7 S. E. (2d) 439 (W. Va. 1940).

⁵³ *State v. Augustine*, 114 W. Va. 143, 171 S. E. 111 (1933). Under a contract of sale of cattle, *D*, buyer, paid \$50 down and promised to pay cash for the balance on the delivery day. On that day *A* and *D* met and drove the cattle out to where they commingled with other cattle of *D*, nothing being said about payment, *A* presuming *D* would "settle-up" afterwards. *D* gave *A* two checks, requesting that presentment be delayed, and when they were later protested, *D* gave notes for the checks and thereafter became insolvent, having sold the cattle. At no time from the day of issue did *D* have enough money to cover the checks. The court held that *A* contemplated a cash sale, and *D*, by his silence, indicated he was ready, willing and able to pay, and the cattle were given into his custody only on conditional delivery, title not vesting in *D* until he issued the checks. *A* accepted the checks in lieu of the represented cash settlement.

⁵⁴ *State v. Augustine*, 114 W. Va. 143, 171 S. E. 111 (1933). It means that the existing state of facts is such that in ordinary course the check will be met. The fact that payment is deferred does not change the representation to a future event, a promise to pay in the future, or a mere extension of credit.

⁵⁵ In *State v. Martin*, 103 W. Va. 446, 137 S. E. 885 (1927), *D* received a draft through the mail payable to "R. L. Martin", which happened to be *D*'s name, but obviously intended for "R. T. Martin" as evidenced on the face of the draft. It had been issued in payment for certain railroad ties and in endorsing it over to *A* for \$47.10, *D*, as an attempted explanation, falsely represented that he was running a saw mill and had been delivering ties on the railroad, and that the draft was sent to him by *X*, a debtor of *D*. The court held that since *A* parted with the title as well as the possession of the money and the jury found that *D*'s pretenses were false, then the latter was guilty of obtaining property by false pretenses.

If the false pretenses are of such a character that they could not have induced one to part with his money, there could be no reliance on the representation. *State v. Hurst*, 11 W. Va. 54 (1877).

Where a defendant was indicted under the "Worthless Check Act" (see notes 59 and 60, *infra*) the court said "There is no offense, unless the money or property obtained was parted with in reliance upon the false representation made by the check or draft If the vendor or lender relies upon the financial ability of the other party and not upon the representation of funds

Selling stolen property, knowing it to be stolen, is obtaining property by false pretenses. "The law would presume, that a person, having in his possession property which he knew to be stolen property, had no authority to trade or sell it."⁵⁶ The false pretense is representing that he had such authority. Although the West Virginia statute does not state "knowingly by", which words are found in the statutes of some of the other states, the element of *scienter* must be present and alleged, *i.e.*, that the defendant knew that his pretenses or representations were false.⁵⁷

It is no defense that the false pretenses were such as would not have deceived an ordinary person of average intelligence, although the rule may have been otherwise at the early common law. "The law is as much for the protection of those ignorant and illiterate and full of credence as for the protection of the astute and incredulous."⁵⁸

in the bank, the transaction involves no criminal offense." *State v. Cunningham*, 90 W. Va. 806, 810, 111 S. E. 835 (1922).

⁵⁶ *State v. Halida*, 28 W. Va. 499, 504 (1886). *D* had stolen a colt and made an even trade of it with *A* for the latter's "dun mule" worth \$75. The question arose whether it had been properly alleged that *D*, knowing the colt was stolen, had the *scienter*, *i. e.*, knowledge that his representation was false; since "The *scienter* or knowledge is the essential element by which the act or pretense is to be judged and characterized." *Id.* at 503.

⁵⁷ *State v. Hurst*, 11 W. Va. 54, 61 (1877). See the facts in note 51, *supra*.

Where *D* took an option on real estate from *A*, sold the property for a profit to *B* representing that there were no heirs, when in fact there were heirs with outstanding claims, of which *D* knew, the court thought that it was *D*'s plan and design to induce *B* to part with his money by reason of the false representations as to the state of the title of the land. *State v. Lilley*, 112 W. Va. 231, 164 S. E. 242 (1932). The fact that *B*'s attorney examined the title did not preclude *B*'s reliance on *D*'s misrepresentations, since *D* had answered in the negative to the direct question, Are there any heirs? And though the check in payment was made out to *A*, who indorsed over to *D*, this was no defense, in the opinion of the court, since *D*'s *modus operandi* is of only secondary importance.

⁵⁸ *Sudnick v. Kohn*, 81 W. Va. 492, 94 S. E. 962 (1918). *A*, a merchant, sold goods to *D*, on the latter's representation that he was now married, and would pay in full or substantial part the next payday. *D* later refused to pay, and denied having received the goods, which he had turned over to a woman with whom he was boarding. *A* had *D* indicted for obtaining goods by false pretenses, but the lower court ruled that *D*'s representations as a matter of law were not a probable cause for reliance by *A*, and excluded evidence of these matters. *D* then sued *A* for malicious prosecution, and *A* claimed actual reliance by him on *D*'s statement of his marriage on the basis that married men are more settled and better credit risks. Held, it is error for the court to exclude evidence of *B*'s representations which are for the jury. Reversed and remanded for a new trial.

Early authorities held that the false pretenses must be such as would deceive one of average or ordinary capacity, but "It seems to be held with practical unanimity at this day that there is no such requirement." *Id.* at 495.

Violation of the "Worthless Check Act"⁵⁹ is a type of false pretense which, in this state, does not constitute larceny by statute. But as previously indicated, under the false pretense statute "one may be indicted and convicted of obtaining money or property by means of a false and fraudulent check given therefor, accompanied with the necessary knowledge and *animo furandi*."⁶⁰

Under the "worthless check" section, the issuance of a check on a bank in payment of a pre-existing debt, by one who has insufficient funds in the bank to pay the check is not an offense,⁶¹ and presumably it would be no crime under the false pretense section.⁶²

The type of property which may be subject to being obtained by false pretenses includes "money or goods or other property which may be the subject of larceny."⁶³ Does this refer only to goods subject to larceny at common law, or as extended by various statutes? In *State v. Hurst*,⁶⁴ the court adopted the latter construction, at least inferentially, by stating that certain bank notes and treasury notes (not subject to larceny at common law)⁶⁵ "being now a subject of larceny" fall within the statute.⁶⁶

The property may be obtained from the actual or constructive possession of the true owner, and the general rules relative to possession in larceny are applicable to false pretenses.⁶⁷

Since violation of only the first provision of the false pretense section constitutes larceny, under the former statute the penalty set forth⁶⁸ was construed to apply only to the remaining provisions,

⁵⁹ W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 39.

⁶⁰ *State v. Pishner*, 72 W. Va. 603, at 604, 78 S. E. 752 (1913). Speaking of the statute before the 1931 revision the court said that the object in passing the "Worthless Check Act" was to constitute the making, issuance, and delivery of a check, and thereby obtaining credit, money or goods of another, a crime regardless of the intent or knowledge of the maker of the condition of his account, and to burden him with the duty of knowing the fact, before issuing a check; but relieving him from the offense which under the false pretenses section he would not be, if he pay the amount within the time prescribed by statute. The 1931 revision added "with intent to defraud". See *State v. McGinnis*, 116 W. Va. 473, 181 S. E. 820 (1935), note 50, *supra*.

⁶¹ *State v. Pishner*, 72 W. Va. 603, 78 S. E. 752 (1913).

⁶² See note 51, *supra*.

⁶³ W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 24.

⁶⁴ 11 W. Va. 54 (1877).

⁶⁵ *Regina v. Watts*, 6 Cox Cr. Cases 304 (1854).

⁶⁶ For goods subject to larceny see Note (1940) 46 W. VA. L. Q. 246.

⁶⁷ *State v. Cobb*, 7 S. E. (2d) 443 (W. Va. 1940). See Note (1940) 46 W. VA. L. Q. 246, 250.

⁶⁸ Confinement in the penitentiary from one to five years, or, in the discretion of the court, confinement in jail for not more than one year and a fine not exceeding five hundred dollars.

and since "obtaining money under false pretenses, is by this statute made larceny", then "the penalty of the offense is the same as in other cases of larceny."⁶⁹ The wording of the statute has since been changed to apply the penalty to "any of the provisions of this section",⁷⁰ and the particular punishment attaches to the offense regardless of the value of the property.⁷¹

Receiving Stolen Goods. Whether this amounted to a crime at common law, distinct in itself, has been greatly disputed by the authorities,⁷² but in West Virginia today receiving stolen goods knowing them to have been stolen, or having reason to believe such, is an offense which by statute constitutes larceny.⁷³

Under the statute the offense is comprised of the following elements: "1st. That the goods or other things were previously stolen by some other person. 2nd. That the accused bought or received them from another person, or aided in concealing them. 3rd. That at the time he so bought or received, or aided in concealing them, he knew they had been stolen."⁷⁴ 4th. That he so bought or received them, or aided in concealing them, *malo animo*, or with a dishonest purpose."⁷⁵

Not only must there be a receiving or concealing of stolen goods, but by the words of the statute peculiar to the Virginias only, it must be proved and alleged that the goods had been received "from another person".⁷⁶ And there must be some con-

⁶⁹ State v. Hurst, 11 W. Va. 54 (1877).

⁷⁰ W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 24.

⁷¹ State v. Grove, 74 W. Va. 702, 82 S. E. 1019 (1914). *D* was convicted of obtaining property by false pretenses and since the goods were valued under \$20 the question arose collaterally with another issue whether he was guilty of a felony under the statute or whether the ordinary larceny statute applied, thus making the offense only a misdemeanor. *Cf.* the penalty for ordinary larceny [W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 13] which is not applicable in false pretenses cases. State v. Martin, 103 W. Va. 446, 137 S. E. 885 (1927).

⁷² The West Virginia court categorically states that it does in State v. Wallace, 118 W. Va. 127, 189 S. E. 104 (1936), citing other local cases. See MILLER, CRIMINAL LAW (1934) § 125 which states that such a conclusion is doubtful; that at most it may have been a substantive misdemeanor.

⁷³ W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 18. On an indictment for larceny, conviction may be sustained by proof of receiving stolen property. State v. Halida, 28 W. Va. 499 (1886); State v. Wallace, 118 W. Va. 127, 189 S. E. 104 (1936).

⁷⁴ Since the 1931 revision of the code, W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 18, this element has been broadened to include "having reason to believe" the goods were stolen.

⁷⁵ State v. Smith, 98 W. Va. 185, 126 S. E. 703 (1925) citing Hey v. Commonwealth, 32 Gratt. 946 (Va. 1879).

⁷⁶ This means that it must be shown from whom the goods were received, or that they were received from persons to the grand jury unknown. State v. Smith, 98 W. Va. 185, 126 S. E. 703 (1925).

nection between the defendant and the thief of the goods, since the statute contemplates two persons: (1) the original thief or a successor in criminal possession of the stolen goods,⁷⁷ and (2) a person to whom that possession is transferred. "The mere discovery and appropriation of stolen goods by a person does not constitute this statutory crime."⁷⁸

Of the four elements in this offense the one presenting the most difficulty is the question of *scienter*. Under the former statute a defendant could be convicted only if he knew the goods were stolen, but since 1931, having reason to believe such, is sufficient.⁷⁹ This knowledge must have existed at the time the goods are received,⁸⁰ but if the offense charged is merely concealing the goods, then knowledge subsequent to the actual receiving of the goods, followed by a concealing may be proved to convict of the crime.⁸¹ *Scienter* often is, of necessity, sustained only by circumstantial evidence, which must satisfy a jury beyond a reasonable doubt,⁸² and cannot rest on mere supposition,⁸³ but can be proved by suf-

⁷⁷ There is a split of authority regarding the guilt of a defendant who has received the stolen goods from another who guiltily received them from the thief. MILLER, CRIMINAL LAW (1934) 398.

⁷⁸ *State v. Fowler*, 117 W. Va. 761, 188 S. E. 137 (1936). A car had been wrecked and abandoned in a field and *D* had stripped it of all removable parts. Conviction of knowingly receiving stolen parts of an automobile reversed.

⁷⁹ *State v. Lewis*, 117 W. Va. 670, 187 S. E. 315 and 728, 188 S. E. 473 (1936). See Note (1937) 43 W. VA. L. Q. 232 for a detailed analysis of this case, including interpretations of "knowing" and "having reason to believe."

⁸⁰ *State v. Hill*, 52 W. Va. 296, 43 S. E. 160 (1902).

⁸¹ *State v. Manstoff*, 118 W. Va. 214, 189 S. E. 698 (1937).

⁸² *State v. Dushman*, 79 W. V. 747, 91 S. E. 809 (1917). *D* was indicted for buying and receiving pieces of brass stolen from a railroad. The court admitted evidence that brass of this kind was bought and sold by all junk dealers in the open market as a factor bearing on *D*'s good faith or knowledge on his part that the property was stolen.

⁸³ *State v. Mounts*, 120 W. Va. 661, 200 S. E. 53 (1938). *X* had stolen packets of cigarettes and made various sales of them to *D* at half the retail price, stating they had been given to him. *X* testified as to newspaper accounts of his various burglaries. Conviction for receiving stolen goods reversed for lack of sufficient evidence of knowledge that the goods were stolen. Although inadequacy of the amount paid for the goods is part of the circumstantial evidence tending to give notice of the stolen character, it is not in itself controlling. *Id.* at 665.

"The possession of stolen property, alone, is not sufficient to convict the accused of knowledge of its theft; but such possession may, with all other evidence and circumstances in the case, be considered by the jury." *State v. Manstoff*, 118 W. Va. 214, 189 S. E. 698 (1937). Pieces of meat stolen from *X* were found six weeks later in *D*'s storeroom. *D* failed to make any satisfactory explanation of his acquisition and possession of the stolen property other than he had purchased it. He was convicted of concealing stolen goods.

ficient facts which are suspiciously incriminating, "tending to show guilty knowledge."⁸⁴

Indicative of the strict proof requirement of the *scienter* under the present statute, is the holding that where one is engaged in legitimate business, "It must be shown that actual knowledge had been *brought home* to him that the seller of the article was the thief or that the property had been stolen."⁸⁵ It is not clear whether the court also meant to imply that where the defendant is engaging in illegal business there is less presumption of his innocence.

Obviously once the crime of receiving stolen goods has been completed, an immediate return of the goods, or restitution, is no defense; but on the other hand, a voluntary tender at the time of apprehension, along with mitigating circumstances may tend to show either lack of the required guilty intent, or lack of *scienter*.⁸⁶

Larceny by Embezzlement by a Carrier. The wording of this statute⁸⁷ applies to "any carrier or other person to whom . . . property . . . may be delivered to be carried for hire, or . . . any

⁸⁴ State v. Hill, 52 W. Va. 296, 304, 43 S. E. 160 (1902). Goods stolen from a freight car were later found in *D*'s possession who explained that two men had asked him to deliver the goods to another town. Held, the fact that *D* took the goods to another place by night, hid them in a cowshed, gave a false account as to the contents of the boxes in which the goods were contained, and tried to conceal the true point from which he had come, and other evidence tended to show *scienter*. Conviction of receiving stolen goods affirmed.

In State v. Wainwright, 119 W. Va. 34, 192 S. E. 121 (1937) *D* received goods directly from the men who had stolen them in Virginia. *D*, having never seen them before, questioned them closely, when they acted suspiciously. They had brought the goods in a suit case and sack to him at night, expressly telling him the goods were "hot". Held, evidence sufficient to convict in view of the strongly suspicious circumstances admitted by *D* himself, along with the direct testimony of the state.

The Wainwright case arose under section 19 of the statute being considered, wherein receiving goods stolen in another state is made larceny. The rules and principles applicable to receiving stolen goods apply likewise to section 19, except for the statutory innovation of 1931 mentioned in note 74, *supra*.

⁸⁵ State v. Wallace, 118 W. Va. 127, 189 S. E. 104 (1936) (italics supplied). *D*, a licensed pawnbroker, purchased a valuable ring for \$4.00 from *X*, who had stolen it. *D* failed to produce the ring when officers gave him an inadequate description of it, but later turned it over to the police, and identified the thief. Conviction of larceny by receiving or concealing stolen goods reversed for insufficient evidence.

⁸⁶ State v. Goldstrohm, 84 W. Va. 129, 99 S. E. 248 (1919). *D* had purchased and received from two boys who had burglarized a residence, a valuable lorgnette, chain and revolver. Held, it was error for the trial court to reject evidence that *D* had certain conversations with the arresting officer which would tend to explain *D*'s method of acquiring the property. *D* had a right to show his voluntary tender to the officer which is to be considered with statements he made at that time.

⁸⁷ W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 21.

other person who may be intrusted with such property. . . .” By the interpretation set forth in *State v. Cantor*,⁸⁸ the only case found where it has been construed, this section applies “only to one to whom property is intrusted to be carried and delivered to another person.”

Larceny by Embezzlement by a Fiduciary. The more important part of this statute⁸⁹ declares it to be the offense of larceny for any guardian, personal representative, or other fiduciary to wilfully fail to return an inventory of personal property (if required by law), or to conceal or embezzle such property. No adjudicated cases construing this statute have been found.

J. S. M.

⁸⁸ 93 W. Va. 238, 243, 116 S. E. 396 (1923).

⁸⁹ W. VA. REV. CODE (Michie, 1937) c. 61, art. 3, § 23.